

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES, et al., : Civil Action No.:
Plaintiffs, : 1:23-cv-108
versus :
GOOGLE LLC, : Thursday, June 15, 2023
Defendant. : Alexandria, Virginia
: Pages 1-50

The above-entitled motions hearing was heard before the Honorable John F. Anderson, United States Magistrate Judge. This proceeding commenced at 2:00 p.m.

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PROCEEDINGS

2 THE DEPUTY CLERK: United States of America, et
3 al. versus Google LLC, Civil Action Number 22-cv-108.

4 MR. MENE: Good morning [sic], Your Honor.

5 Gerard Mene with the U.S. Attorney's Office.

6 MS. WOOD: Good afternoon, Your Honor.

7 Julia Wood. Good to see you. My colleague, David Teslicko,
8 from the Department of Justice will be arguing today.

9 MR. EWALT: Good afternoon, Your Honor.

10 Andrew Ewalt from Freshfields on behalf of Google. I'm
11 joined by my colleagues, Julie Elmer, Scott Eisman,
12 Claire Leonard and Craig Reilly. Ms. Elmer will be arguing
13 on behalf of Google this afternoon.

14 THE COURT: Okay. Thank you.

15 Just a couple of preliminary matters before we get
16 into the argument.

17 First of all, thank you all for working together
18 to get the other motion to compel resolved and custodial
19 issues and the other things. I appreciate you all doing
20 that and working together to be able to do that.

21 I also want to just highlight that I am concerned
22 a little bit about the motions to seal that have been filed
23 for all three sets of the pleadings relating to this current
24 motion.

As you know, the documents will remain under seal.

1 until I issue an order dealing with those things, but there
2 may be some further briefing that may need to be done, or I
3 may just decide it on the papers. But I think it's unlikely
4 that everything that everybody is asking to be sealed will
5 remain under seal.

6 And I understand that there are two standards that
7 are put into place, and we're dealing with the lesser
8 standard on these discovery-related matters. But as you
9 probably know, Judge Brinkema is one of the judges in our
10 court that is very sensitive about what gets to remain under
11 seal, and so I am tasked with the order to make sure that we
12 don't over seal information. So I want to highlight that.

13 And I also want to remind you -- and I think I had
14 indicated to the parties earlier when we were talking about
15 overall scheduling -- that neither Judge Brinkema or I will
16 be here on the 30th of June. The Fourth Circuit judicial
17 conference is going on that Friday, so there will be no
18 motions heard in this case on June 30th.

19 Okay. I have read all the papers, all the
20 exhibits, including the 250-page transcript of the 30(b) (6)
21 deposition. I understand most of the issues. I do have
22 some factual questions that I really want to get sort of
23 sorted out before I hear the legal argument. And so I'll
24 ask counsel for the government to come forward first. And
25 to the extent that you can answer my factual questions,

1 that's good; if not, I may ask Ms. Elmer to pitch in and
2 help out.

3 So, as I understand it -- and I guess before we
4 go -- nothing else has been worked out other than the two
5 documents that have been produced and some lesser redactions
6 on four documents; is that right?

7 MR. TESLICKO: That's correct, Your Honor. Two
8 documents were produced without redactions; four documents
9 were produced with more limited redactions.

10 THE COURT: All right. I didn't want to get all
11 wound up and find out I didn't need to do that like last
12 time period, so thank you for that.

13 There seems to be some disconnect between your
14 briefing and their briefing on the number of documents that
15 are related to the Remedy Projects. You know, I'll just use
16 that as the term, because I think that's the term that the
17 parties have both used to some extent. At least in your
18 chart, you have 14, and in their briefing and declaration
19 and all that, they have it as 17. The difference is
20 Documents 2, 10 and 16.

21 Do you agree that 2, 10 and 16 were related to the
22 Remedy Projects, or do you not.

23 MR. TESLICKO: So, Your Honor, I think the simple
24 answer is we don't know because those documents were
25 withheld in full. When we identified in the appendix to our

1 motion which documents were based on code-named projects, we
2 did that based on a letter we had previously received from
3 Google during the course of the pre-complaint investigation.

4 So for the documents you identified where we
5 previously didn't identify them as code-named projects, it's
6 either because we -- it's because they were not identified
7 in that letter from Google, which was the basis for our
8 chart.

9 THE COURT: Well, if you look at 16 -- I can see
10 that maybe for 2 and 10. But 16 says: "Project undertaken
11 in anticipation of litigation in response to active
12 government investigations."

13 Why did you not cross the code-named project when
14 the privilege log description says that directly?

15 MR. TESLICKO: Because the code-named projects are
16 very specific projects. It was unclear from this
17 description whether the document related specifically to a
18 code-named project or was more generally a communication in
19 anticipation of litigation.

20 THE COURT: Okay.

21 MR. TESLICKO: I don't think we're factually
22 disagreeing with Google's assertion that it relates to --

23 THE COURT: Well, you've seen the Lazarus
24 declaration where he outlines that and indicates what those
25 were. Okay.

1 And just to make sure I am clear -- it wasn't
2 necessarily in the briefing and I just want to make sure --
3 because I think it has some significance. Some of the
4 Remedy Project documents were produced with redactions and
5 others were withheld completely; is that accurate?

6 MR. TESLICKO: So I -- Your Honor, I would clarify
7 that to say that some documents that were produced with
8 redactions involved Remedy Projects. The unredacted
9 portions of those documents do not discuss or disclose the
10 Remedy Projects.

11 To our knowledge, any document describing the
12 substance of the Remedy Project was fully withheld. So if
13 the document was solely about our project, it was completely
14 withheld. If a portion of the document related to a
15 code-named project but a portion did not, Google redacted
16 everything related to the code-named project.

17 THE COURT: Okay. So just so I have a better
18 sense going through the list, 1 was redacted, 2 was withheld
19 completely, is that right?

20 MR. TESLICKO: Correct.

21 THE COURT: And I'm just going through the ones
22 that I understand were related to the Remedy Projects.

23 Five was withheld completely, 6, 8, 9, 10 and 11
24 were withheld completely. 12 withheld completely, 13 was
25 redacted, 14 was withheld completely, 15 was redacted, 16

1 was redacted, 18 and 19 were redacted, and 20 was withheld
2 in total.

3 MR. TESLICKO: That's correct, Your Honor.

4 THE COURT: Okay. Okay. All right. I think that
5 probably takes care of my just overall factual questions
6 about what I wanted to make sure we were -- I was dealing
7 with when we talk about the various issues.

8 And I will say that there -- the real issue, as I
9 understand it that you're presenting to me, is should I look
10 at these documents in camera. And I guess there is a
11 question as to whether you've made the adequate factual
12 showing that at least some of the information contained in
13 the documents may be subject to disclosure is what you say
14 that you need to do on page 11 of your memo.

15 I think it's going to be significant for you to
16 discuss that in two parts. One is the factual showing for
17 the Remedy Projects; and the other is the factual showing
18 for the, arguably two, maybe more, documents that aren't
19 Remedy Projects that are still in dispute, which I think
20 would be 3 and 7.

21 So I'm seeing them through different lenses, to be
22 honest with you, and so I want to make sure I understand
23 what your argument is as to both of them and not putting
24 them all together. Okay.

25 So let me hear what you've got to say.

1 MR. TESLICKO: Sure. Thank you, Your Honor.

2 After many months of conferring with Google on its
3 privilege assertions, plaintiffs --

4 THE COURT: Years. I mean --

5 MR. TESLICKO: Yes.

6 THE COURT: -- you knew about this in 2021.

7 MR. TESLICKO: That's correct.

8 THE COURT: Google sent you a letter in August of
9 2021, or I think that's right. August of 2021, they said we
10 think these are privileged materials.

11 MR. TESLICKO: That's correct.

12 We met and conferred extensively since that time
13 to try to narrow a variety of privilege disputes. As Google
14 acknowledged, they did produce tens of thousands of
15 documents as part of that meet-and-confer process, but we
16 still have some outstanding disputes, especially related to
17 the project documents. And, as a result, we filed a present
18 motion to compel, seeking an in-camera inspection of 21
19 documents that we created as a sample of certain categories
20 of documents we had discussed with Google. Those are
21 supposed to be somewhat representative, not statistically
22 significant, but a general sample of the main categories of
23 documents that Google continues to withhold, either for
24 attorney/client privilege or for attorney work product.

25 And we picked those categories because they

1 represent both the greatest concerns to the government in
2 terms of the privilege claims that Google's asserted, and
3 also we believe they're the most relevant, or some of the
4 most relevant documents, to the main issues in this case.
5 They involved -- they appear to involve key business
6 decisions, business strategies that are at the heart of the
7 government's complaint. And --

8 THE COURT: Help me understand the factual basis
9 for what you just said. You took a lengthy deposition of a
10 30(b) (6) deponent who testified about, in broad terms, these
11 five projects, and, as I understand it, other than the
12 Banksy one, nothing ever came of it. Is that -- I mean,
13 that's what he said. Is that different than what -- do you
14 have any factual information that no decisions were made
15 based on those projects?

16 MR. TESLICKO: We do not have any factual
17 information that decisions were made based on those
18 projects. I would point out that certain projects, such
19 as -- I think this is -- the names of the projects are not
20 being withheld here.

21 THE COURT: I mean, in their opposition -- I mean,
22 at least the brief in their opposition, as I understand it,
23 only withheld the names of deponents or names of
24 individuals.

25 MR. TESLICKO: For example, Project SingleClick

1 and Project Stonehenge evolved into a non-privileged
2 code-named project called 1Door that continues to -- at
3 least as of the time of the deposition was still continuing.

4 So I don't know if ultimately business decisions
5 were made that stem from those earlier projects. But to
6 answer your question specifically, no, we don't have any
7 information that a particular business decision was made,
8 only that they were considered as part of these code-named
9 projects.

10 THE COURT: Okay. And presentations were made,
11 and then either the project moved from SingleClick to
12 Stonehenge or Sunday to Monday or whatever, but -- okay.
13 All right.

14 So, you know, you mentioned business decisions,
15 and that's why I was trying to understand if my
16 understanding, from based on the deposition transcript and
17 other information, that there were actual decisions made as
18 a result of this. Okay.

19 Keep going.

20 MR. TESLICKO: Sure. Just to clarify, Your Honor,
21 I don't think we have any evidence that decisions were made
22 coming out of that project to take particular actions,
23 except for Project Banksy and possibly Project 1Door, but
24 there were, you know, the negative inferences that decisions
25 were made not to change certain policies that are within the

1 scope of the government's complaint today.

2 Going back to the purpose of the motion, you know,
3 as Your Honor already noted, we filed the motion, Google has
4 withdrawn two of its claims and narrowed four. The other
5 thing I would point, though, in addition to narrowing its
6 claims or abandoning those particular claims, it also
7 abandoned its attorney/client-privileged claims for 13 of
8 the remaining documents. Those were on the log. Google is
9 assigning attorney/client privilege over 13 documents. It's
10 not advanced those claims in its opposition brief. And, in
11 fact, for five of those documents in those logs, they never
12 asserted work product. So the first time they asserted work
13 product was in the opposition brief.

14 The bulk of the remaining dispute, as Your Honor
15 has focused on, are the 17 project-related documents where
16 Google asserts privilege, and so I'll start there.

17 In our view -- or we understand that Google's
18 taken the view that because it faced frankly a tsunami of
19 domestic and international investigations into its business
20 decisions, that key strategic and commercial discussions and
21 analysis related to those can be walled out by attorney work
22 product protection, and we think that that would lead
23 ultimately to a perverse result. That large companies
24 subject to substantial litigation because of their business
25 practices are able to potentially wall off key portions of

1 their business. By contrast, smaller companies that are not
2 subject to litigation are not able to avoid the wide breadth
3 of discovery.

4 And I also want to make clear at the outset
5 before -- sorry, Your Honor.

6 THE COURT: If you look at what the evidence is in
7 front of me, these projects would not have been initiated if
8 there hadn't been the investigations that were ongoing.

9 They were initiated as a result of those. Are you saying
10 that's right or not right?

11 MR. TESLICKO: I think, respectfully, we would
12 disagree, Your Honor, at least with some of the projects.

13 So, for example, Project Sunday, according to the
14 deposition testimony of the 30(b) (6) deposition testimony,
15 the corporate representative there did say that litigation
16 was one of the animating reasons for Project Sunday. But
17 when asked if regulatory matters also led to the creation of
18 Project Sunday, the deponent testified that many countries
19 or regions that -- have put into effect some either privacy
20 or antitrust regulations. So that list is going to be much
21 longer here when he was asked what animated Project Sunday.

22 So I think that's one small piece of evidence.
23 That, in addition to litigation reasons. There may have
24 been commercial reasons or regulatory reasons that led to
25 the initiation of Project Sunday.

1 And just to take a step back, Your Honor, the
2 government is at a disadvantage here, as anyone challenging
3 privilege claims is. We haven't seen the underlying
4 documents. And I want to be clear that if Your Honor
5 reviews those documents in camera and it turns out that, on
6 their face, they clearly reflect litigation strategy, the
7 legal opinion work product of counsel, the government's not
8 seeking that. But based on the scraps of evidence that we
9 have compiled about why these projects were initiated and
10 what they covered, we think there's a reasonable basis to
11 believe that portions of those documents involve business
12 discussions that occurred before the project began, or
13 business discussions that would have occurred irrespective
14 of the anticipated litigation.

15 THE COURT: Okay. Go ahead.

16 MR. TESLICKO: So I think the main portion -- or
17 point where Google and the plaintiffs seem to disagree with
18 respect to work product is whether it is relevant that the
19 documents have a nexus to business discussions or business
20 decisions.

21 Google, in its opposition at page 13, takes the
22 view that whether there's a nexus between the documents and
23 business decisions is irrelevant. And they represented that
24 because the projects --

25 THE COURT: It's not dispositive, I think is what

1 they really are arguing.

2 MR. TESLICKO: I would agree with that, Your
3 Honor. And that's the position we're taking. It's not
4 dispositive one way or the other, but it's certainly
5 relevant. And I think Your Honor's decision in the *Capital*
6 One security breach litigation, the *Zetia* decision as well,
7 reflect the reality that the analysis is a totality of the
8 circumstances consideration that looks at who was involved,
9 the nature of the documents, the purpose of the documents,
10 the use of the documents at issue.

11 And that's why, Your Honor, the United States and
12 plaintiff states have requested in-camera review to shed
13 light on that question, because we tried to take a 30(b) (6)
14 deposition and got very little information about the nature,
15 scope, purpose of the documents at issue, or, frankly, who
16 was involved in creating them.

17 THE COURT: Well, you got direct answers from the
18 person about who was involved telling you, you know, this
19 person was on the team, this person didn't do anything, this
20 person was an engineer, this person was that, that we spent
21 10 hours, 30 hours, 50 hours. And you make the argument
22 these are major business decisions, that Google spends
23 20 hours on a project, and you seem to think that's a
24 significantly major business decision that Google is making
25 seems to be a little bit of a stretch.

1 But, I mean, you know, not only the letter that
2 you got before the deposition, but the deposition itself
3 also clearly outline what lawyers were involved, you know,
4 who was on the work team and who was on the supervisory team
5 and those kinds of things. So I don't understand why you
6 say you don't have any idea who was doing anything.

7 MR. TESLICKO: I think we know, Your Honor, who
8 was involved generally in the project. Those people were
9 identified in the letters and in the depositions. But even
10 Google's corporate representative pointed out that there was
11 a difference between people who worked on the project and
12 people who were just generally aware. And the letter, for
13 example, as he testified, covered both.

14 When we tried to get more information about who
15 actually created these documents, what their roles were, we
16 did not get that information. I think that type of
17 information is important as the Court considers the totality
18 of the circumstances, whether these documents would have
19 been created for business reasons, for regulatory reasons,
20 for any other reason besides litigation.

21 And not to say that litigation wasn't one of the
22 reasons. I think we all agree that those were multipurpose
23 documents. They may have served a litigation purpose, but
24 the evidence available to us that we've identified in
25 pages 18 to 22 of our motion, our opening brief, suggest

1 that these were either continuations of the types of
2 business discussions that occurred beforehand.

3 Banksy is a great example because Google has
4 acknowledged there was a Banksy project that considered the
5 exact same product changes under the exact same code name.
6 One's privileged; one's not. Their deprivileging of one of
7 the documents where they had redacted the word "Banksy" kind
8 of illustrates that it's really hard for them to even police
9 the line between the privileged and non-privileged version
10 of Banksy. And their deponent at the 30(b)(6) recognized
11 that the non-privileged Banksy court had morphed into the
12 privileged Banksy.

13 And that's not -- and so I think, you know, in
14 light of the evolution of some of these projects from
15 privileged to non-privileged, which is SingleClick and
16 Stonehenge evolving into 1Door, and Banksy evolving from a
17 non-privileged project to a privileged project, there's some
18 reasonable basis to believe that these were ongoing business
19 discussions that would have occurred in substantially
20 similar form, which is the standard, but for litigation.

21 I think the other piece of evidence we would point
22 to is the little information we have about some of these
23 projects further confirms that there were commercial
24 purposes driving this analysis.

25 So, for example, in our opening brief, we identify

1 that one of the projects, per Google's own documents, was
2 initiated because of competitive pressure on margins, and as
3 part of that project, they consider changes to prices,
4 policies. Those are the kinds of discussions you would see
5 in the ordinary course of business, and they're precisely
6 the types of changes to policies or existing policies that
7 are at issue in the government's complaint here.

8 And, again, we're not saying that litigation had
9 no bearing on this. Certainly anticipated litigation was
10 relevant to what was going on in these business discussions.
11 But it wasn't the driving force, as the Fourth Circuit has
12 said the standard is, and we don't think that every portion
13 of every document would not have been created in
14 substantially similar form.

15 What we're asking the Court to do, and what we've
16 asked Google to do, is to take a narrower view of work
17 product that's more consistent with the narrow view of
18 privilege articulated by the Fourth Circuit. And that
19 answer is, go through the documents, redact out litigation
20 strategy, redact out legal opinions, but produce the other
21 business analysis that's contained in those documents.

22 THE COURT: Well, if I was going to accept the
23 statements under oath by the 30(b) (6) deponent -- and one is
24 stronger than the others, but I'll take the strongest --
25 that this project would never have been undertaken if we did

1 not anticipate litigation. So help me understand how
2 anything done with a project in which the statement is "this
3 project would have never been undertaken unless there had
4 been litigation" doesn't fall within the parameters of
5 something that should be protected.

6 MR. TESLICKO: So two answers, Your Honor.

7 First, I think the question -- the work -- the
8 question about whether a document is covered by work product
9 centers on that particular document. And one of the faults
10 we identified with the declaration was, it makes those
11 statements -- it parrots the work product standard at the
12 project level. It says the documents are related to the
13 project and kind of skips a step. Because the real question
14 is, were these specific documents in whole, because they've
15 been withheld in full, created because of litigation, and
16 would the entire document -- no portion of the document have
17 been created in substantially the similar form but for
18 litigation.

19 So I think --

20 THE COURT: If you accept the fact that this would
21 have never been created unless there was litigation, then
22 shouldn't everything in the document be protected? If you
23 start a project, and I would have never started the project
24 unless there had been litigation or anticipation of
25 litigation, then the reason that it was started was

1 anticipation of litigation; right?

2 MR. TESLICKO: So that is correct, Your Honor.

3 But I think it depends what gets shoehorned into that
4 project.

5 So to play on that hypothetical, you know, but for
6 litigation, would there have been a project called Project
7 Sunday? Maybe not. Probably not. But there's a separate
8 question about whether once you create Project Sunday, if
9 you feed into that broader project, commercial discussions,
10 regulatory discussions that were already ongoing or would
11 have occurred anyway, does that mean that the work product
12 protection now encompasses all of those discussions that
13 would have been going on at the company more generally?

14 On your question specifically about the
15 declaration, though, I would direct the Court to *Zetia* where
16 the declarants there, three declarants, in fact, had similar
17 statements, if not stronger statements, that none of the
18 documents would have been created but for litigation in any
19 form. And even then, the Court undertook an in-camera
20 review. It did uphold the work product protection for the
21 documents at issue, but it also went out of its way to
22 clarify that financial analyses or projections -- standalone
23 financial analyses or projections contained in those
24 documents, if they're responsive to discovery requests,
25 must, nonetheless, be produced separately.

1 THE COURT: How would a review of the documents
2 reveal the intent behind the preparation of the documents?

3 MR. TESLICKO: Your Honor, without seeing the
4 documents, it's hard for me to say.

5 THE COURT: I know.

6 MR. TESLICKO: I will acknowledge it's possible
7 that Your Honor could review the documents and it's not
8 clear. It could look like the entire document was created
9 because of litigation, it all reflects litigation strategy,
10 and then Your Honor would probably uphold the claim. But we
11 think there's also a reasonable chance that Your Honor looks
12 at the documents, and at least portions of the documents
13 clearly have nothing to do with litigation strategy, legal
14 opinion of counsel, and are simply considerations of changes
15 to the business that would have occurred in the ordinary
16 course.

17 THE COURT: All right. So let me just pose this
18 hypothetical.

19 So project -- pick one, I don't care which one --
20 says, you know, go off, and can we do X? And if we do X,
21 what's going to happen to our business? One technical, one
22 business. And the lawyers and the client need to know both
23 because they need to know whether we're going to pursue a
24 remedy of proposing it will do X.

25 You're telling me that making an analysis of

1 making a change to X should be produced even though, by
2 producing that information, you're disclosing what X would
3 have been?

4 MR. TESLICKO: I think, Your Honor, we're arguing
5 something slightly different. And not to change your
6 hypothetical, but maybe to distinguish the two cases, I
7 think there's a difference between what -- the type of
8 document Your Honor reviewed in the *Capital One* security
9 breach case where there was no dispute there, a report was
10 commissioned because of litigation, no one disputed that
11 litigation was anticipated, and the core question is,
12 looking at those documents, would something like this have
13 been created in the ordinary course anyway? Versus a
14 settlement proposal, like in *Zetia*, where the only question
15 there is should we settle, and is this economically
16 feasible?

17 I think there's a very large gap in between those
18 two worlds. I think we are -- we believe that at least
19 portions of the documents and portions of these projects are
20 closer to the Mandiant report in the *Capital One* security
21 breach case where, you know, the type of business analysis
22 was ongoing and would have occurred anyway, but it got
23 rehoused in light of anticipation of litigation under a
24 project. And there it was directed by counsel, and
25 nonetheless, Your Honor ordered it produced. And I think --

1 THE COURT: Well, that was -- that case is much
2 different than this case.

3 MR. TESLICKO: Recognizing --

4 THE COURT: You've got an enormous data breach
5 that comes -- immediately comes about. The people at
6 Capital One are under strict regulatory guidelines of what
7 they need to do. They already had a company on call that
8 was there for their business purposes. They used the same
9 contract, they just brought them in to start something
10 there.

11 If you go to the second part of my decision in the
12 *Capital One* case, you see it's much different. You know, it
13 was a different set of people, different things, you know,
14 lawyers were involved, lawyers were directing it. You know,
15 that -- and I said you didn't need to produce that one. So
16 you're picking one, but there's another one out there that
17 analyzes things in a little bit of a different light.

18 MR. TESLICKO: I understand, Your Honor. And that
19 also involved, you know, an outside vendor. I think there
20 is analogy here, though. Google took an existing team that
21 does this work all the time in the ordinary course of
22 business. You know, again Banksy, it's the same employees
23 who were working on the same product changes, they took the
24 same team, asked them to continue the work they were already
25 doing, with an eye towards part of it addressing a

1 regulator's concern, but as the 30(b) (6) deponent testified,
2 they also went out to customers, discussed how the product
3 change would work with them, commercialized it.

4 That sounds like a commercial-type discussion,
5 that, again, relevant to litigation, relevant to settlement,
6 no dispute there. But at least a portion of that, for
7 example, seems like an ordinary course business discussion
8 and analysis that would occur at Google.

9 And that may be true of these other projects. As
10 I indicated, some of the few documents we have on these
11 projects suggest that it was commercial concerns driving
12 some of these analyses around margin pressure. And Your
13 Honor might be able to review the documents and see, you
14 know, this half of a deck talks about the commercial
15 considerations and why we may or may not, irrespective of
16 litigation, want to change the way our products work or the
17 margins we're charging, here's a separate part of the
18 document that deals with the United States government's
19 investigation, the State of Texas' investigation, here's how
20 this proposed changes could be used as a remedy in that
21 case, or here's our analysis of the strength of those
22 claims, do we need to do this business project for that
23 separate purpose.

24 THE COURT: But by disclosing the financial
25 analysis of this change that's under consideration, it would

1 disclose what the change was under consideration. I assume
2 that's what it would. Again, I haven't seen it.

3 But, you know, again, if it's -- you know, if the
4 team is tasked with think about doing X and let me know
5 what's going to happen, can we do X, and, if so, what's
6 going to happen, and they spend a week or two or a month,
7 maybe, in some of these, six weeks for one, you know,
8 brainstorming, coming up, getting some information together
9 and saying, yes, we can do X, and if we do X, then the
10 impact financially is Y. If I give you the impact of X
11 financially is Y, then you're getting information relating
12 to the remedy that was under consideration. You understand
13 what I'm asking?

14 MR. TESLICKO: I understand what you're asking,
15 Your Honor. I think hypothetically a document could look
16 like that. I think also hypothetically a document could
17 consider a range of different prices Google was going to
18 charge on its products, and based on its market power in
19 these markets, whether it could or could not charge certain
20 of those. And if the document is portraying a range of
21 prices, a range of product changes, I don't think that
22 necessarily discloses at all what Google was planning to
23 propose. And, to our knowledge, Google didn't propose most
24 of those remedies. As Your Honor noted in the 30(b) (6),
25 decisions didn't come out of many or most of those projects.

1 So I'm not sure they ever got to a final Remedy proposal.
2 But we are very interested in the business analysis that was
3 ongoing separate and apart from any kind of Remedy proposal
4 that was or wasn't made.

5 THE COURT: Help me understand how you think that
6 would be divorced from the proposal that is being
7 analyzed -- the proposal that is under consideration if you
8 look at what the financial impact that would have.

9 MR. TESLICKO: So I -- I don't think that --
10 again, it's hard to talk in abstract without seeing the
11 documents, of course, but I don't think it's necessarily the
12 case that a business analysis of we are charging X margin on
13 these products right now, we think we could charge more, we
14 could charge less. These would be the commercial outcomes
15 of doing so, this is what our competitors would do or force
16 us to do. I don't think a general analysis necessarily
17 discloses Google's attorneys' views of the strengths or
18 weaknesses of the government's case, of what the remedy
19 proposal will be.

20 Now, if there is no separate slide like that and
21 there's only a slide or a document that says this is the
22 proposal, here's how much it will cost us, I don't think we
23 would argue that that should be produced. But given
24 Google's broad view of every single reference to these
25 projects as privileged, we think there might be something

1 less that Google could produce.

2 THE COURT: Well, talk about the other two
3 documents.

4 MR. TESLICKO: So the other two documents, Your
5 Honor, where Google continues to assert attorney/client
6 privilege, one is Document 3 where they've removed most of
7 the redactions. I think they --

8 THE COURT: So there's only one redaction left; is
9 that right?

10 MR. TESLICKO: Yes. Yes.

11 And, Your Honor, we wouldn't press that claim. I
12 mean, we do think that in light of their decision previously
13 as part of a clawback -- so this was an intentional decision
14 to clawback the document and make those redactions, we think
15 those prior redactions were clearly unsupported, and that
16 would frankly give Your Honor a sufficient basis to exercise
17 the discretion to look at the remaining redaction. But
18 we're not pressing that particular document at this time for
19 in-camera review, because the redactions had been narrowed
20 to remove those from the finance section, from the top
21 partner section and to just focus on the legal section,
22 which seems relatively appropriate.

23 The other document, Your Honor, where Google
24 continues to assert an attorney/client privilege claim --

25 THE COURT: Number 7.

1 MR. TESLICKO: Number 7. So they did remove some
2 of those redactions -- one set of redactions in that
3 document.

4 The rest of that document describes -- deals with,
5 again, similar to the code-named projects, changes to
6 product policies, changes to revenue shares and margins. It
7 was created by a non-lawyer, and I would note that the
8 privilege basis identified in their log is providing legal
9 advice -- providing legal advice regarding legal aspects of
10 product development. That, in fact, is the same type of
11 privilege basis they used in Document 21, which they
12 withdrew the redaction for.

13 Just to us, in light of all the other documents
14 that they've produced, including the ones they've produced
15 in response to our motion, the fact that there's no lawyer
16 actively participating from the face of the document that we
17 can see, combined with the broader discussion of revenue
18 shares and changes to buying doors, we think the Court
19 should engage in an in-camera review of that document to
20 confirm that that redaction just cannot be narrowed.

21 THE COURT: Okay. What else would you like to say
22 in your opening salvo here?

23 MR. TESLICKO: The only thing I would add, Your
24 Honor, is because Google deprivileged, in full, two
25 documents that were withheld for a substantial period of

1 time on the basis of attorney/client privilege, we did
2 request in our reply that the Court supplement --

3 THE COURT: We're not substituting.

4 MR. TESLICKO: Okay. Understood, Your Honor. I
5 just wanted to raise it.

6 THE COURT: Okay.

7 MR. TESLICKO: Thank you, Your Honor.

8 THE COURT: All right. We'll hear from you.

9 One issue I want you to address initially is what
10 impact, if at all, does the protective order that was
11 negotiated, agreed to and entered by the Court have on the
12 issue of whether I should be doing in-camera review. Just
13 to maybe refresh your recollection as to what the protective
14 order provides, is that -- and this is in the -- basically
15 the clawback provision.

16 It says once they had been asked to claw it back,
17 what you need to do, must not use or disclose the
18 information of the claim as resolved, must take reasonable
19 steps to retrieve the information and may promptly present
20 the information to the Court under seal for determination of
21 the claim in camera.

22 What -- if you read that language, it doesn't seem
23 like, you know, anything's in there. You know, subject to
24 the preexisting law that you have to show certain facts or
25 circumstances; it sounds like it was negotiated by the

1 parties. If you claw this back, they will not use it, but
2 they may promptly present the information to the Court under
3 seal for determination of the claim in camera.

4 MS. ELMER: Your Honor, I admit, I had not focused
5 on that particular part of the protective order. I had been
6 focused on 12(a), which stated that, you know, clawbacks of
7 documents are an inadvertent production or a production of
8 material. Whether inadvertent or otherwise is not a waiver
9 of the privilege. And I was looking at that particular
10 provision particularly in light of some of the arguments
11 that the DOJ had made in their brief.

12 But if you'll indulge me, Your Honor --

13 THE COURT: Okay.

14 MS. ELMER: -- I'll take a look at the other
15 provision.

16 Yes. So my understanding, Your Honor, is that
17 that provision is if they do not want to sequester the
18 document or give the document back upon our request that
19 they claw it back, then they may present it to Your Honor.
20 I think, so far, we've been able to manage our --

21 THE COURT: It's not "or," it says "and." These
22 are all things that are required. One, will promptly
23 notify -- after being notified, the party must promptly
24 return, sequester, destroy the information. Must not use
25 the information until the claim is resolved. Must take

1 reasonable steps to retrieve it, and may promptly present
2 the information to the Court under seal for determination of
3 claim in camera.

4 MS. ELMER: So the clawbacks that were made that
5 we're here about today, Your Honor, were clawbacks that were
6 made two years ago.

7 THE COURT: Okay. All right. So go ahead and
8 tell me what you want to tell me based on what their
9 argument was.

10 MS. ELMER: So Google's position in this dispute
11 is based on factual information, information in the record.

12 We have a deposition of a corporate witness,
13 30(b)(6), who sat for a full day of testimony to answer
14 questions about these Remedy Project documents, and he
15 answered all of the questions that he could without waiving
16 the privilege or waiving work product protection for those
17 documents.

18 The plaintiffs' position, on the other hand, is
19 based on speculation. For example, they alerted that
20 Project SingleClick and Project Stonehenge evolved into
21 1Door. That is not true. They have not supported that
22 assertion with any evidence.

23 To the contrary, Google has produced 3 million --
24 nearly 3 million documents in the investigation phase alone.
25 32 Google witnesses provided testimony in the investigation

1 alone. We've produced another 330,000 documents last week.
2 We have another 90,000 coming to them this week. And in
3 those documents is ample evidence about Project 1Door
4 because it wasn't a Remedy Project, and we produced that
5 information.

6 Similarly, with Project Banksy, Google was so
7 careful in how it conducted its privilege review and so
8 cautious about making sure that we were not overclaiming
9 privilege or overusing work product, that we agreed with the
10 DOJ in early 2021 to run Banksy as a search term for our
11 document production, because we knew there was a portion of
12 it that was ordinary course, and we produced all of that.

13 We also knew that in agreeing to run that term, we
14 were taking on a very heavy burden of a nuanced privilege
15 review, and a difficult one. But we knew that we needed to
16 take that on because we needed to be sure that we were not
17 hiding behind a work product or overclaiming a privilege.

18 So I do think that, you know, plaintiffs are
19 overstepping here, and they're asking you, Your Honor, to
20 completely disregard the sworn testimony of a corporate
21 representative. I really don't know what more could have
22 been said. I mean, he specifically testified, these
23 projects would not have been undertaken but for these
24 government investigations.

25 THE COURT: He only said that as to one of the

1 projects. That was his strongest testimony as to that.

2 Others he said that they were started, but he never said
3 they would have never been done absent litigation.

4 MS. ELMER: He was asked, I believe, on page 73
5 about Project Sunday. Was Project Sunday any other purpose,
6 said no. It was not a dual-purpose project, it was not a
7 business project, it was a project that was undertaken
8 because of seven, later eight, active government
9 investigations, all of which he identified in his
10 deposition. And because of those investigations, he further
11 testified that Google anticipated litigation, which we are
12 now here doing.

13 THE COURT: The language in the declaration, help
14 me understand. It can be interpreted in a couple of ways,
15 and I was a little surprised at the way that it was crafted.
16 "It would not have occurred in substantially similar form."
17 That doesn't necessarily mean that it wouldn't have
18 occurred; it's just the form in which it was done. Is that
19 what that means?

20 I mean, that's completely different than we only
21 did -- I mean, that is contrary to the testimony that the
22 30(b) (6) deponent gave about SingleClick that, you know,
23 would never have been undertaken if we did not anticipate
24 litigation.

25 MS. ELMER: I think a good way to understand that,

1 Your Honor, is that there are certain topics that may have
2 come up in the context of some of these Remedy Projects that
3 also may have been addressed in ordinary course projects.

4 In the ordinary course -- any ordinary course
5 document that addresses those topics, Google has produced or
6 is in the process of producing. And, in fact, the 30(b)(6)
7 witness himself testified about some of these topics.

8 You'll see, Your Honor, toward the back of the deposition,
9 there is a section where he is testifying in his individual
10 capacity about certain subject matters. And that's because
11 some subject matters were discussed in the ordinary course,
12 and then they were also discussed in the context of some of
13 these Remedy Projects.

14 The nature of the Remedy Project documents, if
15 you're thinking about a topic in the context of what would
16 it take to resolve a government -- an active government
17 investigation, the concept of what would it take to resolve
18 it is revealing the mental processes of a lawyer. And it is
19 very difficult to separate out, you know, a topic or subject
20 matter that might arise also in an ordinary course situation
21 from the overall legal thinking of what would it take to
22 resolve or put to bed this particular investigation. And
23 that's why Google has been very careful to produce any
24 ordinary course document that deals with a wide range of
25 topics, any topic, really, relating to its ad tech business,

1 but it is only refusing to produce these specific Remedy
2 documents where the topics were considered in the context of
3 what would it take to resolve this government investigation.

4 THE COURT: Why are some of these Remedy Project
5 documents redacted and others withheld completely?

6 MS. ELMER: So the documents that were created for
7 the Remedy Project documents, those have been withheld in
8 their entirety. There are other documents in this
9 particular set that aren't Remedy Project documents, per se.
10 We're calling them that, we label them that for shorthand in
11 our briefing. But as the brief explains and the declaration
12 explains, too, I think, they reveal the substantive details
13 of the Remedy Project documents. But, for example, I think
14 two of the documents at issue are employee evaluations where
15 the employee, either himself or his boss, is describing what
16 the employee worked on that year, and the description
17 reveals the substantive nature of the Remedy Project
18 document that the employee assisted the legal department
19 with. The rest of the employee evaluation is left
20 unredacted because the evaluation itself is not a Remedy
21 Project document.

22 The same is true of a couple of email threads
23 where you have employees who are discussing other topics,
24 but then they bring up a particular topic, and then they
25 refer to the Remedy Project document. Some of these are the

1 Remedy Projects. Some of these employees were in the
2 need-to-know group for the Remedy Projects, and by revealing
3 the name of the project, they are revealing the substance of
4 the project because of the context in which they are raising
5 it.

6 THE COURT: And, again, I'm reading in between the
7 lines, to some extent, but, you know, I read the MDL
8 decision by Judge Castel. It looks like Google agreed to
9 produce those documents in camera. Why didn't you do that
10 here?

11 MS. ELMER: Those I'm trying to remember --

12 THE COURT: Four documents at least.

13 MS. ELMER: -- what happened in that.

14 In that particular dispute, I believe that there
15 was an agreement -- a prior agreement between the parties
16 where the discovery committee in that case was going to
17 select at random, by their choosing, four documents to
18 submit to the Court in camera. So it was sort of a previous
19 negotiation among the discovery committee and the parties in
20 that particular case.

21 Here, Your Honor, respectfully we believe that in
22 particular with respect to the Remedy Project documents, the
23 record is so strong, we have a declaration, we have a
24 deposition, we don't have any evidence from the plaintiffs
25 that -- to the contrary; we have assertions from them. We

1 also don't have any showing from them that they have a
2 substantial need for this material.

3 What facts are contained in these Remedy Project
4 documents that are not in the millions of pages of documents
5 that have already been produced to them?

6 THE COURT: They don't know, and I don't know.
7 So, I mean, that's always the problem, you don't know what
8 you don't have. And so you coming in here and saying they
9 can't point to what they're missing because they haven't
10 seen it isn't going to be a very strong argument; is it?

11 MS. ELMER: Well, respectfully, Your Honor, I
12 think they have seen these. These are clawback documents.
13 And I think that's part of the issue here is that they are
14 trying to reconstruct what they have already seen.

15 THE COURT: Well, put in perspective for me -- I
16 mean, I read the deposition again, and the estimate of the
17 amount of time that was put into these Remedy Projects, I
18 was not overly impressed by the number of hours that were
19 put into any -- Banksy may be different. I mean, obviously
20 that was multitudes more than anything else. But, you know,
21 I'm just trying to get a sense as to how many documents
22 would have been prepared if people only worked on something
23 for ten hours.

24 MS. ELMER: And I believe, Your Honor, the -- the
25 representative testified in specifics on some of these, you

1 know, that there was one presentation that was created for
2 Sunday. I think that that was maybe given twice, so there
3 might be three slide decks out there. He testified that one
4 or two presentations were created for the other projects.

5 There were not a ton of documents that were
6 produced because these were projects that were taken up.
7 They worked on them for a couple of months, and then they
8 let them die on the vine.

9 Banksy is different, of course, because it is
10 something that actually progressed toward a settlement that
11 the French Competition Authority accepted.

12 THE COURT: Okay. Well, let's talk about the
13 other document -- or Documents 3 and 7.

14 MS. ELMER: So Document Number 3, there's a legal
15 section there that reflects the legal advice of an attorney,
16 Matthew King. I don't think the DOJ is pressing that
17 document forward.

18 Document Number 7 is a document that is a slide
19 deck, and the redactions are mostly from a comment page that
20 follows a slide deck. The way that Google Slides works, you
21 can call out other employees in comments, and so the
22 comments that are redacted are either a comment that is
23 discussing a conversation that the employees had with an
24 attorney, an in-house attorney, and repeating the advice
25 that that attorney gave, or one of the comments is from an

1 attorney himself, and then another one is restating the
2 advice of an attorney.

3 And then there is a bullet on one slide that is a
4 redaction of what legal -- its feedback from legal, and that
5 is what the redaction is. And then there is another slide
6 where two bullets are redacted, and those redactions relate
7 to the legal risks of undertaking a decision.

8 And the comment slides that are redacted, they're
9 all identical. So there's three slides that are fully
10 redacted, and all of those are those comments, the
11 back-and-forth comments, and they're all the same. I don't
12 know why they have, you know, duplicates of the slides in
13 there.

14 That is an example of the type of document that
15 was very common in this review set. These very complex
16 documents where there are call-outs to lawyers, and they
17 really do require, you know, very careful and sort of
18 tedious review and redaction.

19 THE COURT: Well, and there was one redaction that
20 was removed that appeared twice; is that right? I think it
21 was that Document Number 7.

22 MS. ELMER: Document Number 7.

23 THE COURT: I know that you've removed some
24 redactions in Document Number 7, or produced a revised
25 version of Document Number 7.

1 MS. ELMER: Oh, that's right. There is a full
2 slide, You Honor, I believe it is. Yeah. A full slide was
3 removed. And what it was is a restatement of what the
4 language is in Google's contracts. I think an overzealous
5 reviewer thought that this is kind of contract language,
6 attorney language, I need to redact it. You know, we took
7 another look at it, as we are always happy to do, and, you
8 know, no, anyone reading a contract would see this, this is
9 not legal advice, and we unredacted it. I think it's Slide
10 Number 34.

11 THE COURT: Okay. Thank you.

12 MS. ELMER: Thank you, Your Honor.

13 THE COURT: Thank you.

14 MR. TESLICKO: If I could address a couple of your
15 questions to Google's counsel, Your Honor.

16 So, first, on the protective order point, we did
17 raise this at the end of our opening brief. Our protective
18 order is modeled on the MDL protective order. It contains
19 that same exact provision. There is a slight distinction in
20 that the MDL plaintiffs also have this separate privilege
21 committee, but the language around submitting disputes over
22 privilege for in-camera review in the face of a clawback is
23 the same. And to the extent that Google is arguing somehow
24 that provision doesn't apply to prior clawbacks, our
25 understanding is they are taking the position that the

1 protective order applies to prior clawbacks for waiver
2 purposes, so certainly it should apply to clawbacks with
3 respect to in-camera review.

4 Going to your --

5 THE COURT: Well, I mean, my question was really
6 does that really change the law. I mean, obviously the
7 standard is that you have -- you don't just ask for it; you
8 have to show a reason to do it. And, you know, my concern
9 is that if I went down that road, I would be looking at, you
10 know, 4,000 clawback documents, or 3,900.

11 MR. TESLICKO: That's correct, Your Honor. And I
12 will -- we will spare you that.

13 With that said, the fact that there was a clawback
14 is at least one consideration that the Court's -- that this
15 Court's considered before in whether there's a basis for
16 in-camera review. I suspect that's partially why this
17 provision is in the protective order in the clawback
18 section, not that there's a waiver via the clawback, but
19 there's some indicia that, you know, a reviewer -- and in
20 this case, these clawbacks, or for multiple clawbacks,
21 multiple reviewers thought that the substance was not
22 privileged.

23 I'll jump to the end where counsel left off, which
24 is Document 7. And I have copies of Document 7, because
25 it's one of the few privileged documents that I could hand

1 up if Your Honor would like. But, just to clarify,
2 continuing redactions exist on slides that discussed
3 commercial risks at the top, discussed a section called
4 decisions needed on whether to provide direct access to
5 advertisers for one of Google's products.

6 So these are not -- if you look at the slide on
7 its face, there's not obvious indicia that this is a legal
8 section or a legal discussion. Unlike in Document 3 where
9 they limited the redaction to the legal risks section. So I
10 point that out just to clarify that this document,
11 Document 7, is different than Document 3.

12 You asked how many project documents were created
13 in light of the short nature of the documents. We have a
14 partial list of the documents that Google's provided to us,
15 which is Exhibit 17 to our opening brief. There's about 250
16 or so total across all projects.

17 I will note that, based on the information
18 provided in the opposition, it seems like that list is
19 incomplete because Google's asserted privilege over
20 additional documents not on that list. But to give you a
21 sense of volume, Exhibit 17 has that information broken down
22 by project.

23 Google's counsel mentioned that we haven't
24 demonstrated substantial need. We're not seeking a waiver
25 of work product, and the substantial need standard applies

1 to waiver; we are merely seeking documents that are not
2 subject to the attorney work product protection, and those
3 would be documents not created in the ordinary course. All
4 we need to do to be eligible to receive that -- or entitled
5 to receive those documents is merely show relevance. And I
6 don't think there's any dispute here that the documents are
7 at least relevant to the plaintiffs' claims.

8 THE COURT: It all comes down to whether they're
9 privileged or not.

10 MR. TESLICKO: Correct. Correct. I just wanted
11 to clarify, we're not seeking to overcome the privilege,
12 therefore we don't need to show separately a substantial
13 need for the documents; it's merely relevance.

14 The last point I wanted to come to was the
15 deposition testimony on Project Sunday. And I think there's
16 a bit of semantics going on. And, to be honest, the
17 corporate designee was not a lawyer. But it does appear
18 that he conflated regulatory actions with litigation and
19 just regulations. And just to take you back to a point that
20 I made earlier, on 89 at 11 to 12, he says Project Sunday
21 was begun because of a host of global regulatory actions
22 across privacy and antitrust. And when we followed up to
23 ask what he meant by some of those things, at page 95,
24 starting at 8, we asked: What investigations, litigation or
25 regulatory matters was Project Sunday initiated in response

1 to? And he said we need to separate that out. You're
2 asking for regulatory matters as well. And then he goes on
3 to say that there are many countries or regions that have
4 regulatory issues related to antitrust and privacy.

5 I don't think Google's contending they anticipated
6 litigation from any of those other separate regulatory
7 concerns. And I draw out that point to say that I think you
8 could read the 30(b)(6) testimony to say litigation was one
9 of the reasons, but regulatory concerns across the globe
10 were another consideration, especially on privacy issues.
11 That's not anticipation of litigation; that's a separate
12 regulatory concern, in addition to the commercial
13 considerations we think were at stake.

14 And then lastly --

15 THE COURT: Well, he does say, you know, what
16 government investigations form the basis for Project Sunday.
17 I mean, that was the question that was asked, form the basis
18 for Project Sunday, and he said basically the same one that
19 we've talked about, the list which you'll find on page 2 of
20 the letter.

21 MR. TESLICKO: I agree.

22 What I'm pointing out is that investigations --
23 government investigations he identified were a basis, but
24 not the sole basis. And I think what he's identifying or
25 explaining in 95 is that regulatory concerns, across a host

1 of countries that are not contained in that list, also were
2 bases for initiating Project Sunday.

3 And the last point I'll make on that is, in
4 particular with respect to Project Sunday, you've seen in
5 the briefing, Google's, in our view, walked away from the
6 representations that the testimony, given by their senior
7 vice president for many of their commercial lines of
8 business, where he said he -- Google identified him as an
9 initiator of the project originally in their letters. He
10 said he never instructed an attorney to work on the project;
11 attorneys never instructed him.

12 Again, not dispositive, but the fact that the
13 senior vice president at Google is giving that testimony and
14 saying that attorneys were not involved in -- actively in
15 that project, or at least in his initiation of the project,
16 I think provides some basis to think that this project had
17 more than one purpose, and those are commercial, regulatory
18 or anything else other than anticipated litigation.

19 And I think, at a minimum, that provides a factual
20 basis for Your Honor to look at the documents, consider
21 whether it's clear on their face that they were created --
22 they would not have been created in substantially similar
23 form, irrespective of litigation, and if they would have,
24 order the production of those parts that don't reflect legal
25 opinions, litigation strategy or the like.

1 And if Your Honor doesn't have any other
2 questions, I --

3 THE COURT: I think I understand the issues.
4 Thank you very much. And, you know, the briefing was very
5 good on this. I did have a few questions I needed to get
6 addressed -- and you can go ahead and have a seat. Thank
7 you.

8 You know, as I commented earlier, you know, there
9 are, I think, two separate issues in front of me. One has
10 to do with the project documents, Remedy documents, whatever
11 you want to call them, the 17 that have been identified by
12 the defendant in their opposition, and the other document
13 now.

14 There's a lot more meat on the bones, so to speak,
15 on the project documents as far as the 30(b)(6) deposition.
16 The declaration only addresses those documents for the most
17 part, and so I think -- you know, I have a record in front
18 of me that, you know, honestly has surmised, may be wrong,
19 may be this, may be that, but I don't think I have enough
20 factual information in front of me to make the finding that
21 it isn't protected or that I would need to do an in-camera
22 review of those documents.

23 I think, read broadly and, you know, fairly, that
24 the 30(b)(6) deponent indicated that all five of these
25 projects, I guess, or at least the four in the second part

1 of the Banksy projects were all done as a result of
2 government investigations and the concern of future
3 litigation anticipation.

4 You know, I am accepting Google's representation
5 that if we task somebody to go focus on something quickly
6 about making change A, but there's some other group out
7 there that's working on change A that got a much broader
8 base, and, you know, more involved in doing things like
9 that, that they're not holding that back because, you know,
10 of changes to products or platforms or whatever are a part
11 of an ongoing business investigation.

12 But it sounds to me in reading the record, that,
13 at various points in time, lawyers were involved, thoughts
14 were being made about how can we resolve certain things, and
15 people were tasked with investigating that, and those were
16 the specific projects.

17 And, you know, again these were projects that, at
18 least based on the information that's been presented to me,
19 were modest in nature and seemed to be one-offs, to some
20 extent. And obviously if you spend, you know, 30 hours,
21 45 hours, 50 hours or 10 hours on a project, that is not
22 indicative of something that is of a major undertaking by a
23 corporation like Google. And that includes, as I read the
24 deposition testimony, of all the individuals involved,
25 counting up all their time, including the presentations.

1 And there were a lot of people that were at some of these
2 presentations.

3 So, you know, this is an issue that I think was
4 tied -- these projects themselves were tied to particular
5 issues having to do with trying to resolve, address some
6 concerns with ongoing investigations or remedies. So I do
7 think that, you know, the assertion of the privilege on
8 those documents, given the record that I have of the 17 --
9 and, again, I'm only addressing the 17 that are in front of
10 me. So I'm not, as Judge Castel said, making advisory
11 opinions as to any of the other documents. If there's a
12 different factual record for them, then I would have to deal
13 with them. But as to those 17 documents, I'm not going to
14 require them to be produced for in-camera review and
15 inspection. I don't think that a showing has been made
16 that's sufficient for me to make them to do that. And, you
17 know, I'll be honest with you, I think part of that is
18 having gone through this process before in some big cases.

19 Reading a document doesn't tell me the intent of
20 the document. And it's a difficult way -- I mean, you know,
21 it doesn't -- they don't typically say I am producing this
22 document as a result of, you know, you're so-and-so and
23 directions and those kinds of things, although, it appears
24 that there's some instructions from people to do certain
25 things. But I think under the circumstances, I'm not going

1 to -- I do think I should look at Number 7, though. I
2 think, you know, there's enough going around with Number 7
3 that it probably is appropriate for me to at least review
4 both the current redacted version and an unredacted version
5 of Document Number 7. I'll look at it, and I don't need any
6 further briefing, argument or discussion on that. I'll look
7 at it. I have the list of the people involved, and so I'll
8 be able to make a decision on that hopefully fairly
9 promptly. But get me that sometime by tomorrow, if you
10 could, and I'll look at it and get you a decision on
11 Document Number 7 early next week.

12 Okay. Anything else on this case today?

13 MS. ELMER: Thank you, Your Honor.

14 MR. TESLICKO: Thank you.

15 THE COURT: Mr. Reilly.

16 MR. REILLY: Yes, Your Honor. Just quickly.

17 You had mentioned some concerns about the sealing,
18 and we would -- I don't know what the Court had in mind.
19 For example, if you wanted to identify particular exhibits
20 you were thinking of unsealing or that could be resubmitted
21 in redacted form. We could then address those and see how
22 many we could work out in advance and whether we would
23 request further briefing.

24 THE COURT: Yeah. I am inclined, just given the
25 nature of this case, before denying a motion to seal

1 outright, probably requesting further briefing on that issue
2 to get the parties to look at it a little bit closer and do
3 things. But, I mean, I was focusing on the substantive
4 motions, but also --

5 MR. REILLY: Understood.

6 THE COURT: -- in doing that was looking at some
7 of the information that had been redacted in that version,
8 and I have some concerns of whether it's going to meet the
9 appropriate standard.

10 But I think, under the circumstances, it's
11 probably better for me to give you a warning and one more
12 opportunity to address it before I just say the clerk is
13 directed to unseal something. Okay.

14 MR. REILLY: Thank you, Your Honor.

15 THE COURT: Thank you. Anything else?

16 MS. WOOD: Thank you, Your Honor.

17 THE COURT: Okay. Thank you. Court will be
18 adjourned.

19 (Proceedings adjourned at 3:07 p.m.)

20

21 I certify that the foregoing is a true and accurate
22 transcription of my stenographic notes.

Stephanie Austin

Stephanie M. Austin, RPR, CRR